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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

FACEBOOK, INC.,

Plaintiff,

v.

POWER VENTURES, INC., a Cayman Island  
 corporation and d/b/a POWER.COM, a  
 California corporation; STEVE VACHANI, an  
 individual; DOE 1, d/b/a POWER.COM,  
 DOES 2-25, inclusive,

Defendants.

Case No. 5:08-CV-05780 LHK

**DEFENDANTS' CASE MANAGEMENT  
 STATEMENT**

Date: May 1, 2013  
 Time: 2:00 P.M.  
 Judge: Hon. Lucy J. Koh  
 Courtroom: 8, 4th Floor

This Court has set a Case Management Conference for May 1, 2013. In light of opposing  
 parties' vastly differing positions on all but a few administrative points, Power Ventures, Inc. and  
*pro se* defendant Steven Vachani hereby submit this Defendants' Case Management Statement.

**I. JURISDICTION AND SERVICE**

All parties have been served. This Court has subject matter jurisdiction pursuant to 28

1 U.S.C. §§ 1331 and 1367. Facebook has asserted claims against Defendants alleging violations  
2 of the CAN-SPAM Act, 15 U.S.C. §2701 *et. seq.*, the Computer Fraud and Abuse Act, 18 U.S.C.  
3 § 1030 *et. seq.* (“CFAA”), and California Penal Code § 502(c). Venue is proper under 28 U.S.C.  
4 §1391(b).

## 5 **II. FACTS**

6  
7 In December 2008, Plaintiff Facebook, Inc. (“Facebook”) filed in the Northern District  
8 Federal court of California a complaint against joint defendants Power Ventures, Inc. (“Power”)  
9 and Power’s CEO, Vachani (Dkt. No. 9), for, among other things, violations of the CAN-SPAM  
10 Act, CFAA, and California Penal Code § 502. The actions underlying the tort claims consisted of  
11 approximately 60,627 emails sent through the Facebook server via a Power.com “event” creation  
12 to Facebook users by Facebook users. Upon learning that “event” invitations for the Power  
13 contest were being sent through its servers, Facebook took measures to intercept and control this  
14 activity. Not a single user complaint was received by Facebook in response to the Power  
15 campaign event emails.  
16

17 After three years of litigation, summary judgment was awarded on Plaintiff’s motion in  
18 February 2012 (Dkt. No. 275), erroneously finding no possibility of doubt that Defendant Power  
19 committed acts sufficiently violative of the CAN-SPAM Act, CFAA, and California Penal Code  
20 § 502. At that time, the Court reserved for determination on the separate issues of (1) Defendant  
21 Vachani’s personal liability for the acts of the corporate defendant, and (2) damages. In support of  
22 their relative positions, the Plaintiff and the collective Defendants each submitted a brief on both  
23 remaining issues in March 2012. (Dkt. Nos. 288 and 299). In mid-August 2012, Defendant  
24 Vachani was permitted to submit, and so submitted, a supplemental brief on the issue of his  
25 personal liability for the adjudged actions of the corporation. (Dkt. No. 317).  
26

27 In late August, both defendants filed for bankruptcy. As such, a stay was automatically  
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1 imposed in the case at issue, and the Court ordered administrative closure until such time as the  
2 bankruptcy proceedings are resolved. (Dkt. No. 325).

3 In its brief on damages and personal liability (Dkt. No. 299), Facebook claims entitlement  
4 to \$80,543 for Power's violation of CFAA and CA Penal Code § 502 and \$18,188,100 for  
5 Power's violation of the CAN-SPAM Act. Private claims under the CAN-SPAM Act are of a  
6 statutory and punitive nature. (See 15 U.S.C. § 7706(g)). Facebook reaches the \$18,188,100 value  
7 by claiming the statutory *maximum* penalty of \$100 for each of the 60,627 emails and punitive  
8 treble damages, totaling \$18,188,100. Facebook's claim for actual damages is \$80,543, which  
9 consists of approximately \$5,500 for the time spent by a Facebook employee to investigate and/or  
10 address possible security matters associated with the Power campaign emails<sup>1</sup> and approximately  
11 \$75,000 for legal services performed by Facebook's counsel at Perkins Coie.  
12

#### 13 **A. Background of CAN-SPAM Claim**

14 Power Ventures, Inc. ran a social network aggregation website - then located at  
15 www.power.com - which enabled users to access their various social network account  
16 information and communication tools from a single user account on www.power.com. In late  
17 2008, Power added Facebook to its social network collection and ran a launch campaign – “Bring  
18 100 Friends, Win 100 Bucks! – using a monetary incentive to encourage users to invite their  
19 Facebook friends to create a www.power.com account. The contest information was posted on a  
20 Facebook event page, and users of both www.facebook.com and www.power.com could invite  
21 their friends to view the contest event information by selecting which friends would receive the  
22 invite. When the invitations were submitted, notification was sent to each selected friend via  
23 whichever notification method each www.facebook.com user designated in his or her  
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26  
27 <sup>1</sup> Facebook, Declaration of Ryan McGeehan in Support of Facebook's Motion for Partial Summary Judgment on  
28 Count 1 under the CAN-SPAM Act, Dkt. No. 213-4. FILED UNDER SEAL. The value of a few days' of an  
employee's time—an employee whose job is to conduct the activities for which damages are claimed—is closer  
to \$1,500 than the \$5,500 claimed by Facebook.

1 www.facebook.com notification settings. In other words, invited friends who opted to receive  
2 email notifications from www.facebook.com when their friends sent communications received  
3 said invitation to view the contest event via email.

4 Facebook's CAN-SPAM claim is based on their assertion that over 60,000 of these  
5 "unsolicited" emails were sent to www.facebook.com users and, despite receiving no complaints  
6 from these users, purport these email to be in violation of the Federal CAN-SPAM Act since the  
7 header information in the emails, which is automatically and exclusively controlled by Facebook,  
8 misleads the recipient as to the sender or initiator of the email. In fact, the mere reference of  
9 www.power.com in the email message and the fact that Power's campaign was targeted at  
10 recruiting new users to its website is inherently straightforward and in no way "materially  
11 misleading" as required under the statute. Thus, Facebook's CAN-SPAM claim must fail under  
12 the black letters of the statute, as well as under the guidelines for such analysis clearly set out in  
13 Omega World Travel v. Mummagraphics, Inc., 469 F.3d 348 (4th Cir., 2006) .

14 Even if Facebook is awarded damages less than the amount sought, the Summary  
15 Judgment alone sends the message that the Court supports Facebook picking and choosing who  
16 can use its service – irrespective of compliance with their terms of use – by suing under the CAN-  
17 SPAM Act for an amount that would put most small businesses under. Arguably, such activity  
18 amounts to censorship and, undoubtedly, is one large step closer to court-sanctioned anti-  
19 competitive activity.

20 Irrespective of whether Power complied with Facebook's terms of use, as this is in no way  
21 relevant to any element of their CAN-SPAM claim, and ignoring the fact that Power worked  
22 diligently with Facebook for weeks following Facebook's initial, unofficial complaint to bring  
23 their program in compliance with Facebook's terms of use, the issue remains whether Facebook  
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1 can and should be allowed to prevail on a CAN-SPAM claim where there were no complaints, no  
2 misleading messages, and arguably no actual damages.

3 It is inconceivable as to why Facebook would fight so hard to send a message to its users  
4 and advertisers that Facebook, at its discretion, can sue and prevail on a claim for \$300 per  
5 message against anyone who writes content or funds a contest or offers a deal interesting enough  
6 for users to share it with their Facebook friends via the mechanism Facebook created for precisely  
7 that purpose. The potential withholding of advertisers and users surely is not worth the efforts  
8 Facebook expended to put one, small competitor out of business, but the defendants' trust the  
9 Court will be less shortsighted in its ultimate ruling on this case.

11 **B. Facebook's Standing to Raise Claims**

12 Facebook achieved standing to exercise a private right of action under each statute by  
13 misrepresenting and mischaracterizing discretionary expenditures as "investigation costs." Not  
14 only did Facebook claim actual damages of \$5,543 for three to four days of an engineer's time in  
15 "investigating" the emails, Facebook claims to meet the \$5,000 damages requirement for standing  
16 in its attorney fees alone, coloring them as investigation costs unique to internet service providers.

17 First, the \$5,543 claim is for the engineer's time is undoubtedly exaggerated on its basis  
18 of approximately three to four days of Facebook employee McGeehan's engineering time (See  
19 Dkt. No. 275). Defendants contend that the actual cost associated with this inconvenience is  
20 closer to \$1,500, assuming a \$120,000 per annum salary, and even then Facebook claims that  
21 McGeehan performed the "investigation" on his own time.

22 The other costs claimed by Facebook—\$75,000 in legal fees associated with investigating  
23 Power and filing the lawsuit (*Id.*)—are not covered under the CFAA or CA Penal Code § 502.  
24 Nothing in the statutes or legislative history indicates that costs associated with investigating  
25 legal claims are meant to be factored into this damages calculation, an argument—among many  
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1 others—carefully articulated in the amicus brief prepared and submitted by the Electronic  
2 Frontiers Foundation. (Dkt. No. 206-2). Through review of the pleadings and briefs on damages  
3 and liability, as well as the EFF amicus brief, the Court will clearly appreciate the large  
4 magnitude of variation between previous cases relating to the CAN-SPAM act that have been  
5 fully adjudicated and conclude here there was no ill-intent, no harm done, no user accounts  
6 compromised, and no documented damages to support a claim under any of the statutes at issue.  
7

### 8 **C. Facebook’s Vexatious Interference in Defendants’ Bankruptcy Cases**

9 Commencing on 27 August 2012 (the “Petition Date”), Power filed a voluntary petition  
10 for relief under Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”) and  
11 Vachani filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code.  
12

#### 13 **1. Initial Inference**

14 In both bankruptcy cases, Facebook argued for dismissal, purporting that the filings  
15 contravened the purposes of the Bankruptcy Code under its good faith requirements. It is well  
16 established that it is not necessarily “bad faith” for debtors to file for bankruptcy to avail  
17 themselves of certain Code provisions. Significantly, it is largely due to multiple years of  
18 Facebook litigation that Power finds itself in the position of filing for bankruptcy in order to  
19 salvage its assets and have a chance at rebuilding, but that is where the association ends. The  
20 timing of the filing was due to 1) the impracticality of waiting any longer to start rebuilding on its  
21 innovation infrastructure, and 2) a deal with former investors involving an intellectual property  
22 sale that allowed Power to remove over \$6 million in debt and approximately \$7.7 million in  
23 liquidation preferences. Power waited until the end of the two-year anniversary from this sale to  
24 further avoid any potential objections within the two-year statute of limitations. Filing of this  
25 petition is not in sync with the timing of Facebook Action’s summary judgment, because it would  
26 be then filed several months earlier. At the time of Power’s Chapter 11 filing, Vachani opted to  
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1 file for Chapter 13, as waiting until after a judgment, if any and if it were large enough, would  
2 disqualify him from Chapter 13 protections due to the debt limit.

3 Further, Facebook repeatedly and consistently argued to both bankruptcy courts that the  
4 present civil matter had been decided as to liability of *both* defendants. (*See* Vachani's Motion for  
5 Clarification re Status of Liability, Dkt. No. 322). It is one thing for Facebook to argue  
6 entitlement to a claim for sanctions even though the amount has yet to be determined, or for  
7 damages on the three counts even though that amount has yet to be determined as well, but it is  
8 wholly unconscionable for Facebook to deliberately and repeatedly mischaracterize the status of  
9 the District Court's judgment in an effort to interfere with Vachani's ability to seek the financial  
10 protections afforded by the Court. Vachani's bankruptcy filing in no way deprived Facebook the  
11 opportunity to pursue their purported claim, and, more significantly, it in no way deprived  
12 Facebook the opportunity to represent itself fairly before the Court and argue its position  
13 honestly.

## 16 **2. Facebook's Claim**

17 Facebook was given notice on the day of the bankruptcy filing. Facebook had every  
18 opportunity to file their claim for an amount that they had already decided, but they declined to  
19 do so until more than a month after joining and staunchly opposing the Chapter 13 case, which  
20 demonstrates their primary goal of interfering with defendants' ability to rightfully receive the  
21 assistance of the Court. When they ultimately did file their claim for \$18M+, they supported their  
22 claim by attempted to further mislead the court into believing that defendant Vachani's liability  
23 had already been determined (*In re Vachani*, Claim 8).

## 25 **3. Objection Based on Debt Limit**

26 Facebook only recently argued, despite ample opportunity to raise potential grounds for  
27 dismissal and absent a change in facts, that the Chapter 13 case should be dismissed as ineligible  
28

1 under Bankruptcy Code § 109(e) on the ground that Vachani's unsecured debt exceeds the  
2 statutory maximum for a Chapter 13 bankruptcy action. As the predominant claim for unsecured  
3 debt in the matter is Facebook's claim for \$18,238,643 (Claim #8; total claim less \$20,000 for the  
4 further contested unliquidated sanctions award), and since this claim is based on a speculative  
5 damages award that not only remains *unliquidated* with respect to both the corporate defendant  
6 and Vachani, the individual defendant, in the Civil Case but also *contingent* with respect to  
7 Vachani's liability on all counts, it cannot have been included in the debt tally at the time of filing  
8 nor can it be included now given no change in circumstances and no means of ready  
9 determination since the damages assessment requires several factual analyses. Thus, the Chapter  
10 13 court now requires clarification as to whether Facebook's claim was contingent at the time of  
11 filing.  
12

#### 13 **D. Vachani's Liability**

14 The only matter determined by Judge Ware was that the actions—actions made by persons  
15 within the company, acting for the company and within the scope of their directorship and/or  
16 employment by the company—constitute a basis for Summary Judgment on the three counts.  
17 There was no finding that Vachani performed actions as an individual outside the scope of his  
18 position as CEO of the corporate defendant. There are no cases remotely related to the present  
19 facts wherein an individual representative was found liable for the CAN-SPAM violations of the  
20 company. There were no additional counts alleged against him. Further, as Power did not commit  
21 acts in violation of the CAN-SPAM Act, its representative cannot be held liable for the same  
22 alleged violation.  
23

#### 24 **E. Damages**

25 As Power did not violate the CAM-SPAM Act and Facebook does not have standing to  
26 bring the private actions at issue, damages cannot and should not be established against the  
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1 defendants. Facebook appears to be following its own pattern of pursuing valueless actions  
 2 against companies that have already agreed not to—and have, in fact, ceased to—perform the  
 3 offending activity. In the civil case at issue, the only associated damages, if any, were at  
 4 Facebook's own unnecessarily reactionary instigation. Indeed, Power made good faith attempts to  
 5 negotiate an amicable resolution upon Facebook's discovery of Power's contest emails.  
 6

7 In fact, Facebook's propensity to litigate claims under these Acts is well established. (See,  
 8 e.g., *Facebook v. Wallace*, No. C-09-00798 JF, 2009 (where defendants who were known scam  
 9 artists sent spam messages to Facebook users' message walls aimed at deceiving recipients into  
 10 visiting defendants' phishing sites; case terminated in default judgment); *Facebook v.*  
 11 *MaxBounty*, No. 5:10-cv-04712 LHK, 2011 (N.D. Cal. Nov. 14, 2011) (where defendants  
 12 facilitated Facebook user traffic to defendants' contracting sites by providing technical assistance  
 13 in creating fake Facebook campaigns; case terminated in settlement); *Facebook v. Fisher*, No. C-  
 14 09-5842 JF (PSG) (where defendants sent more than 7.2 million spam messages to Facebook  
 15 users after obtaining information for at least 116,000 Facebook accounts without consent; case  
 16 terminated in settlement or default judgment as to the various defendants); *Facebook v. Guerbuez*,  
 17 No. 5:08-cv-03889-JF, 2008 (N.D. Cal. Nov. 25, 2008) (where defendants sent more than 4  
 18 million sexually explicit spam messages from members' profiles; case terminated in default  
 19 judgment); *Facebook v. AdScend*, No. 5:12-cv-00414 LHK, 2012 (N.D. Cal. Apr. 25, 2012)  
 20 (where defendants were accused of running a \$20 million-a-year spam scheme that leads social-  
 21 media users to advertising sites by offering fake links to salacious videos; case terminated in  
 22 voluntary dismissal)). There is a private right of action to enable recovery of loss under CA Penal  
 23 Code § 502 and the CFAA, but this does not permit a private company to police the field.  
 24 Facebook seeks to "punish" those believed to be offenders where the penal code itself provides  
 25 for such punishment, should law enforcement find it suitable. Here, no such criminal action was  
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1 initiated, and no actual damages were sustained due to Power's innocuous campaign activity.

2 **F. Sanctions Award for Facebook**

3 On 1 March 2012, the Court granted Facebook's motion for sanctions and awarded  
4 "reasonable costs, including attorney fees" for a renewed F.R.P.C. 30(b)(6) deposition. Facebook  
5 has yet to submit a motion or declaration setting forth their claimed costs and fees, and as such  
6 the Court has yet to set an award amount. Facebook has, however, claimed entitlement to an  
7 award of \$20,000 total for fees and costs in their claim in Vachani's Chapter 13 case, which is,  
8 arguably, far from reasonable. Defendants believe the court should determine such "reasonable"  
9 costs and fees.  
10

11 **G. The Default Order Against Power Ventures, Inc.**

12 Defendant Power moved this Court for reconsideration of its August 8, 2012 Order  
13 striking Power's answer and entering default with respect to codefendant Power (Dkt. No. 314).  
14 This motion was brought primarily on the basis that a change in material fact underlying the  
15 referenced Order - specifically, retention of counsel and notice to the Court thereof - occurred  
16 between the date of the Order and the date of the motion for leave to file this motion for  
17 reconsideration.  
18

19 Having retained counsel and entered notice with the Court thereof, Power is now in  
20 compliance with Local Rules requiring that corporate parties be represented by a member of the  
21 bar of this Court. The Court would be justified in vacating its August 8, 2012 Order on this basis.  
22

23 **III. LEGAL ISSUES**

24 At this time, it is the defendants' position that the following issues remain open:  
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1           A. Should this Court reconsider its analyses of the CAN-SPAM claim elements and  
2           Facebook's standing to bring any of the private actions at issue in its 16 February  
3           2012 Summary Judgment?

4  
5           B. Should the Court reconsider the defendants' Motion for Summary Judgment in  
6           light of its reconsideration of the Summary Judgment order?

7  
8           C. If this Court affirms the Summary Judgment, should Steve Vachani be held liable  
9           and, if so, to what degree?

10          D. If this Court affirms the Summary Judgment, what amount of damages, if any,  
11          should be imposed against the liable defendants?

12  
13          E. What amount of costs and attorneys fees should be awarded to Facebook as  
14          sanctions for the renewed deposition?

15  
16          F. Should the Court vacate the default order against Power Ventures since Power is  
17          represented by counsel and, thus, in compliance with Civil L.R. 3-9(b)?

18       **IV.    MOTIONS**

19           **A.    Pending Motions**

20           The following motions, or outstanding issues associated with motions, are presently  
21           before the Court:  
22

23           1. Defendant Power's Motion for Reconsideration of Default entry. Dkt Nos. 321-322.

24           2. Facebook's Cross-Motion for Entry of Default Judgment Against Defendant Power.  
25           Dkt. No. 322.

26           3. Defendant Vachani's *pro se* Motion for Clarification re Status of Liability. Dkt. No.  
27           332.  
28

1 4. To what amount of damages, if any, is Facebook entitled based on the Court's Order for  
2 Summary Judgment? Dkt. No. 275.

3 5. Is Defendant Steve Vachani individually liable for the damages to be awarded  
4 Facebook?

5 6. To what amount of damages is Facebook entitled based on the Court's Order for  
6 Discovery Sanctions? Dkt. No. 282.

### 8 **B. Anticipated Motions**

9 At this time, defendants anticipate filing a request for interlocutory review of the Court's  
10 16 February 2012 Summary Judgment, primarily on the bases of inconsistent and insufficient  
11 analysis of the CAN-SPAM elements as to warrant Summary Judgment on the claim and on  
12 Facebook's standing to bring these private actions in light of obviously falsified and/or  
13 deliberately mischaracterized claims for actual damages.  
14

15 In the alternative, defendants will request leave to file supplemental briefs on the issues of  
16 damages and defendant Vachani's personal liability in light of Facebook's false claims and  
17 interference in the defendants' bankruptcy proceedings as they relate to the present case.

### 18 **V. AMENDMENT OF PLEADINGS**

19 The case is now fully at issue.

### 20 **VI. EVIDENCE PRESERVATION**

21 The defendants have reviewed the Guidelines Relating to the Discovery of Electronically  
22 Stored Information ("ESI Guidelines"), and the parties have met and conferred pursuant to Fed.  
23 R. Civ. P. 26(f) regarding reasonable and proportionate steps taken to preserve evidence relevant  
24 to the issues reasonably evident in this action.  
25

### 26 **VII. INITIAL DISCLOSURES**

27 Facebook served its initial disclosures on Defendants on July 29, 2011. Facebook served  
28

1 its supplemental and second supplemental initial disclosures on Defendants on October 14, 2011  
2 and January 13, 2012, respectively. Defendants served their initial disclosures on Facebook on  
3 August 15, 2011. To date, Defendants have not supplemented the initial disclosures.

#### 4 **VIII. DISCOVERY**

5 Discovery closed on January 20, 2012. Defendants believe no additional discovery is  
6 necessary at this time.

#### 8 **IX. CLASS ACTIONS**

9 This is not a class action case.

#### 10 **X. RELATED CASES**

11 Vachani's bankruptcy proceeding in the United States Bankruptcy Court for the Northern  
12 District of California, Case No. 12-47150 RLE 13, is related to this matter.

#### 14 **XI. RELIEF**

15 As to be detailed in a forthcoming motion, defendants seek review and reversal of the 16  
16 February 2012 Summary Judgment (Dkt. No. 275), as well as reconsideration of defendants'  
17 Motion for Summary Judgment (Dkt. No. 98). In the alternative, defendants seek leave to file  
18 supplemental briefs on the issue of damages and defendant Vachani's personal liability.

#### 20 **XII. SETTLEMENT AND ADR**

21 The parties engaged in an ADR mediation session on December 14, 2009. The session  
22 was facilitated by mediator Daralyn Durie, who has filed papers with the Court indicating that the  
23 ADR process is not yet complete and that further facilitated discussions are expected. *See* Dkt.  
24 No. 59. To date, the parties have engaged in numerous settlement discussions, but have been  
25 unable to reach resolution. The latest of these settlement discussions was on or around April 26,  
26 2013.

**XIII. CONSENT TO MAGISTRATE JUDGE FOR ALL PURPOSES**

The parties have not consented to a magistrate judge.

**XIV. OTHER REFERENCES**

The parties do not believe any other references are necessary.

**XV. NARROWING OF ISSUES**

Defendants do not believe that issues can be narrowed at this time.

**XVI. EXPEDITED TRIAL PROCEDURES**

An expedited schedule is not necessary in this case.

**XVII. SCHEDULING**

**XVIII. TRIAL**

**XIX. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES AND PERSONS**

Pursuant to Civil L.R. 3-16, the undersigned certifies that as of this date, other than the named parties, there is no such interest to report.

**XX. OTHER MATTERS**

None.

Dated: April 29, 2013                      AROPLEX LEGAL SERVICES & THE LAW PRACTICE OF  
AMY SOMMER ANDERSON

By           /s/ Amy Sommer Anderson          

AMY SOMMER ANDERSON

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POWER VENTURES, INC.

1 Dated: April 29, 2013

STEVEN VACHANI

2  
3  
4 By /s/ Steven Vachani

5 STEVEN VACHANI

6 Steven Vachani (pro per)  
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**CERTIFICATE OF SERVICE**

I am a citizen of the United States and a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Aroplex Legal Services and the Law Practice of Amy Sommer Anderson, 156 2<sup>nd</sup> Street, San Francisco, CA 94105.

On **April 29, 2013**, I served the following document(s) by the method indicated below:

- Defendants' Case Management Statement

**X ECF System:** By filing the document(s) listed above on the Court's Electronic Case

Filing System, I am informed and believe that the documents will be electronically served on all individuals registered with such system. To my knowledge, every individual to whom notice is required is registered with this system and, thus, has been served with due notice by action of this electronic filing.

I declare under penalty of perjury under the laws of the State of California that the above statements are true and correct.

Executed April 29, 2013 at San Francisco, California.

By: /s/ Amy Sommer Anderson

Amy Sommer Anderson